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National Security-Related Expulsion Cases during the Pandemic in Hungary: Secret Revealed?

Abstract

The research investigates the reasons behind the surge in the number of expulsion cases awaiting resolution by the Constitutional Court of Hungary during the initial year of the pandemic by conducting an analysis. Identity between the cases examined can be discovered along issues related to factual and legal merits, which in several cases is the cause of the problem and the effect of which draws attention to the right to an effective remedy. The study focuses on the factual and legal issues of decisions on expulsion and entry and residence bans from the point of view of legally established third-country nationals residing in Hungary. The study explores Constitutional Court and high court decisions of the period compared to the relevant case law of the Supreme Court in a comprehensible manner and digs up the roots of the identified common problems. Exploring the legal basis in the light of basic international and EU law obligations, both access to classified documents and a system of appeal against decisions constitute a set of complex, completely independent and unrelated procedures, that ultimately means that the facts on which the expulsion is based, which are also particularly difficult to ascertain, cannot be effectively disputed.

Keywords: national security-public safety-public order, expulsion, the reasoning of decisions, classified information

Introduction

In 2020 at the dawn of the outburst of the pandemic, States locked up and avoided any sort of migration for obvious reasons of stopping the spread of the virus. This situation also leads to the discussion of the conditions of the expulsion of foreigners due to health security-related issues qualified as a threat to national security, public security or public policy. An expulsion case in March 2020 got huge press coverage in Hungary when the breach of pandemic measures led to a quickly ordered expulsion and ban on entry. Serious concerns were articulated over the legality of the action and the effectiveness of legal remedy was also questioned due to the lack of factual reasoning in the administrative authority decision and the court found it correct.

Hungary is generally attacked for an extreme immigration policy, and the case put the correlation of national security argumentations against foreigners in highlight as in Hungary the concrete reasons, in the view of the expelled foreigner, are often obscured under the cover of classified documents due to national security reasons.[1] Uncertainties around the reasoning leading to the question of the respect of constitutional rights including the right to (effective) legal remedy which is shown by the recent practice of the Constitutional Court (CC). According to data retrieved from the database,[2] during the existence of the CC since 1990, there were 65 cases (among approximately 11 000) related to alien policing and among them 22 were expulsion cases and all but one was strictly related to national security, public security or public policy concerns in the year 2020 and the first part of 2021. These cases were constitutional complaints, i.e., claims towards the CC to contest the consistency of final and binding court decisions with the Fundamental Law.[3] In general,

1 E. Inotai, *From Political Scapegoating to The Coronavirus Law: The Political Exploitation in Hungary*, "Journal for Intelligence, Propaganda and Security Studies" 2021, vol. 15, no. 1, pp. 61–62. On the excessive nature of Hungarian national security fears against foreigners see: Á. Szép, *A nemzetközi védelemben részesített személyek integrációjának szabályozása Magyarországon - nemzetbiztonsági szempontból*, "Justum aequum salutare" 2018, vol. 14, no. 3, pp. 107–131.

2 Sources of the decisions are: National Legal Database (Nemzeti jogszabálytár) and the Constitutional Court database. https://www.alkotmanybirosag.hu/ugykereso/talalatok?hatarozat_sorszam=&hatarozat_evszam=&ugyszam_sorszam=&ugyszam_evszam= (accessed: 27.11.2022).

3 Any persons or organisations affected by judicial decisions contrary to the Fundamental law may submit a constitutional complaint to the Constitutional Court (CC) if the decision made regarding the merits of the case or other decision terminating the judicial proceedings (a) violates their rights laid down in the Fundamental Law, and (b) the possibilities for legal remedy have already been exhausted by the petitioner or no possibility for legal remedy is available for him or her. Article 27 of Act CLI of 2011 on the Constitutional Court.

the number of constitutional complaints shows an increasing tendency[4] and even if most of the cases are closed without constitutional review due to the lack of preconditions, it is a huge increase in immigration cases. Therefore, it is worth examining the reason behind this blatant trend- has it anything to do with the pandemic or what may explain it? It must be noted that the administrative authority decisions of expulsion are not public, a sort of image of the legal practice can be deduced from the available judgements[5] based on the judicial review of authority decisions and the CC case law. As for the national security services practice and its conformity with the law, no information is available.[6]

The intersection of self-protection during the global pandemic and the migration of people who have human rights raises questions about the freedom of the state to have a say in the residents of its territory and the role of health-related issues on the grounds of national security which is a classical reason for expulsion. The question may arise if the above-mentioned numbers are solely in connection with the COVID-19 inducted fears and restrictions or if the legal practice has challenges to overcome; it is worth a closer examination.[7]

The legal question around the topic: motifs of expulsion

All the cases were examined under the same radar: what the factual reason for the expulsion was (reasoning) and how the court reacted to it. The 22 constitutional cases of 2020–2021 were all rejected without substantial review except for one case when the unconstitutionality of a judgment (reviewing an immigration authority of expulsion) was on the agenda in connection with the language usage rights and fair procedure.[8] Apart from that, 21 cases were contested by the foreigners for the grounding.

4 See comparative yearly statistics from 2013: Összefoglaló a 2020. évi ügyforgalmi és statisztikai adatokról, 16 April 2021, (Not available in English) https://alkotmanybirosag.hu/osszefoglalo-a-2020-evi-ugyforgalmi-es-statisztikai-adatokrol (accessed: 27.11.2022).

5 According to Art. 163 of Act CLXI of 2011 on the organization and administration of courts, to ensure publicity and clarity of judicial power, anonymised court decisions, with some exceptions, shall be published within 30 days counting from its putting in writing with free availability in an online system, see https://eakta.birosag.hu/anonimizalt-hatarozatok (accessed: 27.11.2022).

6 In this context, P. Vadász, Zs. Ződi, *A nemzetbiztonsági szolgálatok és a rendvédelmi szervek információkeréséshez kapcsolódó számonkérhetősége*, "Jogtudományi Közlöny," 2020, no. 11, pp. 518–527, esp. p. 527.

7 The manuscript was closed on 30 June 2022.

8 CC Decision 3088/2020 (IV. 23.) ABH 2020, s. 517–522. The foreigner was a resident in Hungary but his permission to reside was withdrawn due to false communication to the authorities and was ordered to leave the country as his title to stay was ceased.

Despite the differences, the cases can be divided into two groups. In the first group of cases composed of 15 constitutional complaints, the core of the situation is quite identical in all of them: Iranian citizens studying in Hungary were quarantined due to their (alleged) behaviour during the time spent in the designated hospital, criminal proceedings were opened against all of them for "breaching epidemic control measures."[9] Following the opening of the procedure, the police as an investigation authority made a recommendation to the immigration authority to expel them and order a ban on entry because the foreigner means a threat to Hungary's national security. They turned to court, but their claim was rejected, therefore all submitted their constitutional complaint to the CC to review the case and make a statement on the unconstitutionality of the judgement. All these happened over a couple of days. Later, the criminal proceedings were terminated (and the crime of violation of epidemic control measures was also decriminalised), and as the police did not maintain its recommendation based on the threat the Iranians posed to national security anymore, the immigration authority withdrew the ban on entry. In several of these cases, there is also available information that the Iranian student regained the residency permit as the special authority statement which is obligatory to obtain in immigration procedures stated that (s)he did not pose a threat to the national public order, public security, and public health.[10]

Among the second group of 6 cases, 2 are related to expulsion for different reasons[11] but 4 form a mixture of different expulsion cases where the reasoning of the administrative sanction, its availability and contestability also played a major role.

9 According to Article 361 of the Criminal Code, any person who: (*a)* infringes the rules of quarantine, epidemiological supervision or control ordered for preventing the importation or dissemination of an infectious disease subject to quarantine obligation; (*b)* infringes the rules of quarantine, epidemiological supervision or control ordered at the time upon the outbreak of a disease; (…) is punishable for misdemeanour by custodial arrest. From 2 April 2020, Gov. Decree 81/2020 (IV. 1.) 5 (1) adds that if a non-Hungarian citizen violates Article 361. of the Criminal Code, (s)he is to be expelled from the territory of Hungary. From 5 May 2020, according to Article 5 (1) of the Gov. Decree 85/2020, if the third country national was expelled because (s)he was qualified a threat to national security, (s)he is *not* entitled to *immediate legal protection* during the judicial review of his/her case. From 7 May 2020, article 5 (2) declared that if the violation of pandemic control measures emerges in relation to COVID-19, the behaviour is no longer constitutes a crime but is only a misdemeanour, so a decriminalisation has been seen. See: I. Ambrus, *A koronavírus-járvány és a büntetőjog*, "MTA Law Working Papers" 2020, no. 5 https://jog.tk.hu/mtalwp/a-koronavirus-jarvany-es-a-buntetojog (accessed: 27.11.2022), pp. 5–7.

10 National Directorate General for Aliens Policing 106-Ji-22937A/18/2020.

11 The case concerned an expired visa and a fake marriage correlation: CC Order 3010/2020. (II. 4.) ABH 2020, s. 136–138. Refusal of residency permit due to fake information CC Decision 3088/2020. (IV. 23.) ABH, s. 517–522.

In neither of these cases, the CC examined the claims related to, inter alia, the fairness of procedure, the presumption of innocence and the effectivity of legal remedy.

In addition, the problem of non-factual decisions due to the classified nature of the special authority turned up in two other immigration-related cases apart from expulsion.[12]

The fact that the documents from special authorities, which are classified and provide a necessary assessment of the risks and threats posed by a foreigner's presence in Hungary, were not included in the decision to expel, created the perception of a capricious and unjustifiable ruling, rendering the judicial review a mere formality. Furthermore, the decision was also silent on the fundamental grounds for the foreigner's categorization.

So, these are different cases. Although, there was one common element in all: the factual reasoning for the expulsion was a core element of the claims. Therefore, the following parts of the paper will examine the reasoning for expulsion in the view of the relevant Hungarian regulation and the frames of international and EU law obligations.

The discretionary power of a State on expulsion and its limits

Expulsion is an autonomous concept that is independent of any definition contained in domestic legislation.[13]

12 CC Order 3273/2021. (VII. 7.) ABH 2021, s. 1741 [10]. In its judgment, the Metropolitan Court (Fővárosi Törvényszék) stated that during its proceedings it had inspected the classified documents of Agency for Constitutional Protection, and it had given rise to get convinced that the determination of the threat to national security was justified. The court was not entitled to provide any further justification. However, the court also noted that the foreigner could have initiated a special procedure to have access to the classified documents that contain the reasons for the threat to national security, but this procedure should have been opened at the classifier, the Agency.

13 *Guide to Article 1 of Protocol No. 7 of the European Convention on Human Rights. Procedural safeguards relating to expulsion of aliens*. First edition – 30 April 2021. Council of Europe/European Court of Human Rights, Strasbourg, https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_7_ENG.pdf (accessed: 27.11.2022), p. 8.; Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals. OJ L 348, 24.12.2008, s. 98–107; Article 3.3, See: C-165/14, *Alfredo Rendón Marín v Administración del Estado*, paragraph 84; and of 13 September 2016, EU:C:2016:675. 56.; 84–86; *cf.* C-544/15, *Sahar Fahimian v Bundesrepublik Deutschland*, CJEU 4 April 2017, ECLI:EU:C:2017:255. 50. See: V. Stehlík, *Discretion of Member States vis-à-vis Public Security: Unveiling the Labyrinth of EU Migration Rules*, "International and Comparative Law Review" 2017, vol. 17, no. 2. pp. 137–138.

Threats to national security may vary in character and be unanticipated or difficult to define in advance,[14] and States are recognized to have a relatively large measure of discretion when evaluating threats to national security and when deciding how to combat these.[15] The requirement of foreseeability in substantive law does not go so far as to compel States to enact legal provisions listing in detail all conduct that may prompt a decision to expel an individual on national security grounds.[16] However, it shall be done in conformity with the relevant international obligations of States and in the case of Hungary, it primarily means the EU law requirements stemming from the common immigration policy and the human rights aspects of the Council of Europe. No matter how differentiated the mobility rules are from EU citizens to third-country nationals (TCN),[17] everyone deserves procedural guarantees based on fundamental rights, including the right to effective legal remedy,[18] and the state of emergency shall not be a reason to derogate them.[19]

Member States should therefore ensure that the ending of illegal stay of third-country nationals is carried out through a 'fair and transparent procedure.' According to general principles of EU law, decisions taken under this Directive should be adopted on a case-by-case basis and based on objective criteria, implying that "consideration should go beyond the mere fact of an illegal stay."[20] Decisions shall be issued in writing and give reasons in fact and law as well as information about available legal remedies. However, the information on reasons may be limited

14 *C.G. and others v. Bulgaria*, App. no. 1365/07, ECtHR, 24 July 2008, p. 40.

15 Council of Europe, *National security and European case-law*, European Court of Human Rights, Research Division, 2013, s. 2, https://rm.coe.int/168067d214 (accessed: 27.11.2022).

16 *Ljatifi v. the former Yugoslav Republic of Macedonia*, App. no. 19017/16, ECtHR, 17 May 2018, pp. 35–53.

17 P. Boeles, E. Brouwer, K. Groenendijk, E. Hilbrink, W. Hutten, *Public Policy Restrictions in EU Free Movement and Migration Law*: *General Principles and Guidelines*, Amsterdam 2021, p. 57.

18 *Bolat v. Russia*, App. no. 14139/03, ECtHR 5 Oct 2006. 81; *Nowak v. Ukraine*, App. no. 60846/10, ECtHR 31 March 2011. 81; *Ahmed v. Romania*, App. no. 34621/03, 13 July 2010, pp. 53–55. *cf.* Art. 1. of Directive 2008/115/EC which declares that the Directive sets out common standards and procedures to be applied in Member States for returning illegally staying third-country nationals, "in accordance with fundamental rights as general principles of Community law as well as international law, including refugee protection and human rights obligations." See: W.A. Schabas, *The European Convention on Human Rights*. *A Commentary*, Oxford 2017, pp. 1130–1131.

19 A/76/257 Human rights of migrants. Report of the Special Rapporteur on the human rights of migrants, Felipe González Morales, Seventy-sixth session, General Assembly, 30 July 2021, p. 50; V. Chetail, *COVID-19 and human rights of migrants: More protection for the benefit of all*. International Organization for Migration (IOM). Geneva, 2020. https://publications.iom.int/system/files/pdf/covid19-human-rights.pdf (accessed: 27.11.2022), p. 4.

20 Directive 2008/115/EC, preamble (6).

where national law allows for the right to information to be restricted, in particular to safeguard national security, defence, and public security and for the prevention, investigation, detection and prosecution of criminal offences. Meanwhile, Member States shall provide, upon request, a written or oral translation of the main elements of decisions including information on the available legal remedies in a language the third-country national understands or may reasonably be presumed to understand.[21] The TCN shall be afforded an effective remedy to appeal against or seek a review of decisions, where the authority or body shall have the power to review decisions including the possibility of temporarily suspending their enforcement unless a temporary suspension is already applicable under national legislation. The third-country national concerned shall have the possibility to obtain legal advice, representation and, where necessary, linguistic assistance.[22] As it comes from a recent case, by analogy, such provisions shall not be derogated by any Member States to serve the maintaining of public order and safeguarding domestic security.[23]

Can you keep a secret? Classified information on the factuality

Despite the state of emergency in Hungary during the pandemic, no specific legislation was made that would have influenced the concerns of national security or public health. According to the legislation in force, the immigration (and the asylum) authority shall base its final decision on accepting a foreigner in the territory of Hungary on the professional opinion of either the Agency for Constitutional Protection or the Counter-Terrorism Centre as special authorities,[24] if the person endangers Hungary's national security or not. The Police can also be involved as an investigating authority during the procedure.[25]

It is the task of the Agency for Constitutional Protections to pursue the inspection of aliens, and to formulate a position on whether a certain alien threats the public order, public and national security of Hungary.[26] The documentation of its

21 Directive 2008/115/EC, Art. 12. 1–3.

22 Directive 2008/115/EC, Art. 13.

23 C-159/21, *GM v. Országos Idegenrendézeti Főigazgatóság, Alkotmányvédelmi Hivatal, Terrorelhárítási Központ,* CJEU 22 September 2022, ECLI:EU:C:2022:708. 84. See: A. Loxa, V. Stoyanova, *Migration as a Constitutional Crisis for the European Union*, in: V. Stoyanova, S. Smet: (eds.), *Migrants' Rights, Populism and Legal Resilience in Europe*, Cambridge 2022, pp. 146–147.

24 According to Gov. Decree 114/2007 (V. 24.) on the Implementation of Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals [Executive Decree] Art. 97 and 165.

25 Executive Decree Art. 97/A.

26 Article 5. § point g) of Act CXXV of 1995 on national security services.

activity is classified[27] and can be consulted by special authorisation granted by the classifier upon request.[28] Disclosure and abuse of classified documents is otherwise a crime.[29] The reasoning of the immigration authority decision may not include the description of the data and specific conclusions contained in the classified document, however, the reasoning must contain an explanation which shows the causal connection of the knowledge of the data with the damage to the public interest protected by the classification.[30] However, the possibility to claim an access permit shall be granted as the right to information self-determination requires. So if it is denied, it shall be subject to legal remedy.[31] As expressed by the CC, this legal remedy shall go beyond formal examination and ensure a substantive examination of the justification.[32] Neither the immigration authority nor the trial court is in a position to decide to reveal the classified information. The permission to get access is subject to a separate and independent procedure opened before the classifier. The court may examine the file to ensure the effective legal protection of the foreigner and shall verify that the information contained therein is a sufficient reason for the action of the immigration authority. The court may not review the data and conclusions of the national security audit, it may only decide whether the contents of the proposal are sufficiently supported by the data.[33] For that reason, the court ensures legal protection by inspecting the file containing classified information and verifying whether the opinion of the Agency for Constitutional Protection proved the existence of a risk to national security.[34] The judicial decision shall not reveal any of the classified information, it must include a justification showing the causal link between the disclosure of the data and the public interest protected by the classification.[35] The 'right to a fair procedure' is thus ensured by allowing the court a substantial review of the claim but not revealing the classified information.[36]

The 'protected public interest' can be embodied in several ways. Its classic case is when it applies to a specific person, but sometimes it protects the technique,

27 Article 5. § (1) c) of Act CLV of 2009 on the protection of classified data [Act CLV of 2009].

28 Act CLV of 2009, Art. 11 (1).

29 *Cf.* Act C of 2012 on the Criminal Code, Art. 265.

30 Act CLV of 2009 Art. 11 (2); *cf.* Kúria I.Kfv.37.468/2021/7/II. [32].

31 See the Supreme Court statement: Kúria Kfv.I.37.381/2017/6., repeated in: Kfv.II.37.983/2020/10.

32 CC Decision 12/2004 (IV.7.) ABH 2004, p. 225.

33 Kúria Kfv.VI.37.640/2018/9.; Kfv.III.37.039/2013/6.; and 15.K.701.318/2020/18., esp. [15]. Also see: Kúria I.Kfv.37.468/2021/7/II. [30]; CC Decision 29/2014 (IX. 30) ABH 2014, p. 1297–1315.

34 Kúria Kfv.II.37.983/2020/10. [16].

35 Act CLV of 2009, Art. 11 (2) *cf.* Kúria I.Kfv.37.086/2021/9. [27].

36 Kúria I.Kfv.37.086/2021/9. [28].

method, and direction of the procedure itself. When the authority or the court carries out the 'necessity-proportionality test,' only these can be considered and cannot include the personal circumstances of the claimant. Consequently, the reasons for a decision and judgment may not go beyond a reference to the legal text which becomes an indication of the public interest to be protected. On the basis of the defined public interest the request for access, disclosure, unauthorized acquisition, modification or use of the data by unauthorized persons, are refused. Similarly, making the information inaccessible to the person entitled to it under the claim of being detrimental to the public interest may altogether be protected by the classification.[37] The review checks whether the formal and substantive requirements have fully complied with the course of the proceeding of classification and whether the classification is well-grounded or not.[38] This interpretation of grounding conforms with the EU requirements of effective legal remedy expressed in Article 47 of the EU Charter of Fundamental Rights and also in judicial practice. If the judicial review is to be effective, the person concerned must be able to ascertain the reasons upon which the decision taken concerning him is based, either by reading the decision itself or by requesting and obtaining notification of those reasons, without prejudice to the power of the court with jurisdiction to require the authority concerned to provide that information to make it possible for him to defend his rights in the best possible conditions and to decide, with full knowledge of the relevant facts, whether there is any point in his applying to the court with jurisdiction, and to put the latter fully in a position in which it may review the lawfulness of the national decision in question.[39] If in exceptional cases, a national authority opposes precise and full disclosure to the person concerned of the grounds by invoking reasons of State security, the court with jurisdiction in the Member State concerned must have at its disposal and apply techniques and rules of procedural law which accommodate, on the one hand, legitimate State security considerations regarding the nature

37 CC Decision 29/2014. (IX. 30) ABH 2014, pp. 1309–1310, [57], [61], [63] and Kúria I.Kfv.37.468/2021/7/II. [31]; Kúria I.Kfv.37.086/2021/9. [25].

38 Kúria I.Kfv.37.086/2021/9. [24]; Metropolitan Court (Fővárosi Törvényszék) 15.K.701.318/2020/18. [16].

39 C-300/11, *ZZ v Secretary of State for the Home Department,* CJEU 4 June 2013, ECLI:EU:C:2013:363. 53–54; Joined Cases C-372/09 and C-373/09, *Peñarroja Fa,* CJEU 17 March 2011, ECLI:EU:C:2011:156. 63; C-430/10, *Hristo Gaydarov v Direktor na Glavna direktsia 'Ohranitelna politsia' pri Ministerstvo na vatreshnite raboti*, CJEU 17 November, 2011ECLI:EU:C:2011:749. 41; C-222/86, *Union nationale des entraîneurs et cadres techniques professionnels du football (Unectef) v Georges Heylens and others*, CJEU 15 October 1987, ECLI:EU:C:1987:442. 15; Joined Cases C-402/05 P and C-415/05 P, *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council of the European Union and Commission of the European Communities,* CJEU 3 September 2008, ECLI:EU:C:2008:461. 337.

and sources of the information taken into account in the adoption of such a decision and, on the other hand, the need to ensure sufficient compliance with the person's procedural rights, such as the right to be heard and the adversarial principle.[40] The relevant Hungarian law is in harmony with these requirements.[41] However, many claims reveal that foreigners have general problems with the independent nature of the procedure of access to classified documents. The entire procedure seems to be futile,[42] or the circumstances make it impossible to open it,[43] or simply the explanation of the courts' argumentation concerning the availability of the classified information by the Act CLV of 2009 when the reasons for being categorised as a threat to national security are claimed for legal remedy,[44] suggesting that probably the administrative procedure did not pay (enough) attention to inform the foreigner on this aspect of the procedure. This latter statement is a mere assumption based on the previously mentioned judicial caselaw that was the subject of the study: the judgments often explained deeply and in detail the circumstances of the procedure that should have been claimed before the classifier to read one's file.

To sum up, the right to information self-determination and also the right to know the reasons for an administrative decision is subordinated to the national interest of the state to its security and also fulfils the requirements of effective legal remedy,[45] at least formally.[46] Although the court has very limited powers in this case, and no jurisdiction over the qualification of the data; it may suggest a review by the *National Data Protection and Freedom of Information Authority* (National

40 C300/11, *supra,* p. 57. See: E. Rák-Fekete, *A tisztességes hatósági ügyintézéshez való jog érvényesülése a gyakorlatban*, "Közjogi Szemle" 2020. vol. 13, no. 3, p. 96.

41 *Cf. Muhammad and Muhammad v. Romania*, Appl. no. 80982/12, ECtHR 15 October 2020, pp. 44–45.

42 Metropolitan Court 49.K.703.152/2021/8 [7]. See: Kfv.I.37.127/2021/10.; Kfv.I. 37.468/2021/7.

43 The procedure does not allow representation, it shall be claimed in person. See: Kúria Kfv. II.37.075/2021/9. [16].

44 See the following Metropolitan Court cases: 49.K.703.152/2021/8.; 16.K.702.875/2021.; 15.K.701.241/2020/27.; 15.K.701.318/2020/18.; 13.K.701.350/2021/7.; 16.K.702.875/2021.; 16.K.707.269/2020/18.; 9.K.707.924/2020/10. Kúria cases: Kfv.II.37.064/2021/9.; Kfv. II.37.075/2021/9.; Kfv.I. 37.086/2021/9.; Kfv.I.37.127/2021/10.; Kfv.II.37.862/2020/11.; Kfv. II.37.863/2020/15.; 37.533/2020/9.; Kfv. 38.329/2018/10.

45 *Cf.* C-362/14, *Maximillian Schrems v Data Protection Commissioner*, CJEU 6 October 2015. ECLI:EU:C:2015:650. 95; K. Gutman, *The Essence of the Fundamental Right to an Effective Remedy and to a Fair Trial in the Case-Law of the Court of Justice of the European Union: The Best Is Yet to Come?* "German Law Journal" 2019, no. 20, pp. 893–894.

46 In this context, compare the development of the legal framework: Zs. Kerekes, *State of play – az információszabadság Magyarországon 2015 őszén*, "Infokommunikáció és jog" 2015, Vol. 12, no. 64, pp. 140–141.

Data Protection Authority). This independent authority is entitled to pursue an ex officio authority procedure to review the legality of the classification of the data if it is probable that the classification of the classified information concerned is unlawful.[47] In its proceedings of ninety days, it may conclude to order the classifier to modify the level of secrecy or declassify the information or may establish that the classifier acted in compliance with the regulations on the classification of national security information. As for the content of the document (factuality), it has no competencies of evaluation.[48]

The CC in its guiding decision of 2014 called attention to the existence of such procedure as a legal tool to contest the legality of classification to gain access to the documents, however, in the ordinary legal practice expressed in the available and examined case law, the mentioning of this possibility hardly emerges in the reasonings.[49]

Prosecution for the breach of pandemic measures as fact for being a threat to national security

In more than a dozen constitutional complaints, the scenario was the same: ongoing criminal procedure, expulsion based on being a threat to national security within a couple of days, then a few months later, the closure of the criminal procedure without conviction and the withdrawal of the ban on entry.

Legal practice acknowledges ongoing criminal proceedings have enough factual basis for the qualification of an alien's presence in the country as a threat to national security.[50] Therefore, it may give rise to the ordering of expulsion. However, the procedural steps leading to the expulsion in the above-mentioned cases raised concerns about another reason. The immigration authority ordered the expulsion upon the recommendation of the police made during the procedure. The expulsion and the ban on entry to the country were ordered, however, a couple of months later, all the criminal proceedings were closed without conviction and the ban on entry was abolished.

47 Act CXII of 2011 on the Right of Informational Self-Determination and on Freedom of Information [Act CXII of 2011] Art. 62.

48 Act CXII of 2011, Art. 63 (1).

49 Metropolitan Court 106.K.700.322/2019/15.; 106.K.700.049/2019/7.; 106.K.700.046/2019/7.

50 CC Order 3171/2020 (21) ABH 2020, pp. 898–900; p. 899. [9]; CC Order 3093/2020 (IV. 23.) ABH 2020, pp. 543–547; p. 544. [5]; [7]; CC Order 3417/2020 (XI. 26.) ABH 2020, pp. 2363–2365 [10]; CC Order 3416/2020 (XI.26.) ABH 2020, pp. 2360–2362; p. 2361 [9].

The police recommendation and its determinant nature on the expulsion decisions was a core element of the legal remedy and in the constitutional complaint. Considering the procedural role of the police, the legislator introduced the possibility to propose to the immigration authority in 2010 but before 1 January 2018,[51] the proposal of the investigating authority was indeed a recommendation and not a binding order. By now, the currently applicable law in force (Act on TCN) expressly states that the competent immigration authority shall not derogate from the proposal;[52] it is not entitled to override it, neither is there a necessity of expulsion nor the recommended time of the ban on re-entry.[53]

The immigration authority proceeds *ex officio*, whereas another authority gave an 'obligatory order' to open and pursue the procedure to expel the foreigners.[54] Besides, the immigration authority's decision did not contain any information on the factuality of the case. It simply invoked the legal provisions that empower the police to recommend the expulsion which binds the proceeding immigration authority. Thus, the authority's decision was called a non-personalised, 'template decision' and during the hearing, no information was shared on the proceedings.[55] In other constitutional complaints, the lack of substantial judicial supervision was highlighted among other reasons. It was argued that the factuality and the causality between the behaviour and its qualification stated that these elements of the procedure were not reviewed by the court therefore the legal remedy was not effective.[56] At the same time other complainants even expressly denied committing the behaviour they were accused of.[57]

51 It was Article 38 of the *Act CXLIII of 2017 on amending certain acts related to migration* inserted the provision into the Act II of 2007 on the Admission and Right of Residence of Third-Country Nationals.

52 Act II of 2007, Article 43 (3); KGD2019.105.

53 Act II of 2007 Article 43 (3); legislative motifs to Act CXLIII of 2017, Art. 38.

54 Commentary on Act CXL on the General Rules of Administrative Proceedings and Services, Article 104, para. 1, (accessed from National Legal Database).

55 CC Order 3045/2021 (II.19.) ABH 2021, pp. 342–343.[8]–[9]; CC Order 3046/2021. (II. 19.) ABH 2021, pp. 345–346. [8]–[9]; CC Order 3047/2021. (II. 19.) ABH 2021, pp. 348–349. [8]–[9], CC Order 3048/2021. (II. 19.) ABH 2021, pp. 351–352. [8]–[9], CC Order 3049/2021. (II. 19.) ABH 2021, pp. 354–355. [8]–[9], CC Order 3050/2021. (II. 19.) ABH 2021, pp. 357–358. [8]–[9].

56 See esp.: CC Order 3487/2020 (XII. 22) ABH 2020, p. 2738. [11]; CC Order 3486/2020 (XII. 22) ABH 2020, pp. 2734–2735, [3]; [12]–[13]; CC Order 3485/2020 (XII. 22) ABH 2020, p. 2730 [12]; CC Order 3492/2020 (XII. 22) ABH 2020, p. 2753. [7]; CC Order 3493/2020. (XII. 22) ABH 2020, p. 2756 [7]; CC Order 3490/2020 (XII. 22) ABH 2020, p. 2747. [7]; CC Order 3489/2020. (XII. 22) ABH 2020, p. 2744 [7]; CC Order 3488/2020 (XII. 22) ABH 2020, p. 2741. [7].

57 CC Order 3487/2020 (XII. 22) ABH 2020, p. 2737. [3].

It is a *sui generis* legal phenomenon in the Hungarian legal practice: the proposal maker authority (police) does the fact-finding, the evaluation of the facts and the deliberation and thus *de facto* the decision-making, while the competent proceeding authority ensures the *de iure* format of decision-making when it orders the expulsion. In the present cases, the full documentation (the detailed matter of facts, and the reasoning of the argumentation that led to the final consequences of expulsion) of this kind of cooperation does not appear in the proceeding authority's decision. Here, the mere legal provision of the Act on TCN that makes the police recommend an order for the immigration authority to impose the expulsion and the ban on entry in its decision was the reasoning. The court that reviewed these decisions found such a solution correct. The court stated that the provision is *ius cogens*; therefore, no further (factual) reasoning is needed.[58] On the other hand, the legal practice is clear: the lack of proper factual and legal grounding of an authority's decision is a serious breach of procedural law that makes the decision unsuitable for a substantive review, therefore, it shall be annulled.[59] This ambiguity leads to further questions related to the nature of police recommendation and the role of the police as a procedural actor which is beyond the scope of this study. In the Iranian students' cases of expulsion, no information occurred on the possible classified nature of any data related to the police documents. Moreover, in the only available Metropolitan Court judgment in one of the Iranian cases, there is an acknowledged reference claiming that during the hearing, the police made the evidence available for the foreigner.[60] It also supports the assumption that in these cases, the factual reasoning embodied in the police documents was not of classified nature. The qualification of data is the targeted consequence of a procedure,[61] and the classification of the data (a document that contains it) is a result of it. Thus, the documents of the police in connection with the investigation and the evidence are not *de iure* classified. In situations where the same authority responsible for

58 CC Order 3487/2020 (XII. 22.) ABH 2020, p. 2738. [6]; CC Order 3488/2020 (XII. 22.) ABH 2020, p. 2741. [4]; CC Order 3489/2020. (XII. 22.) ABH 2020, p. 2744. [4]; CC Order 3490/2020 (XII. 22.) ABH 2020, p. 2744. [4]; CC Order 3491/2020(XII. 22.) ABH 2020, p. 2750. [4]; CC Order 3492/2020 (XII. 22.) ABH 2020, p. 2753. [4]; CC Order 3493/2020 (XII. 22.) ABH 2020, p. 2756. [4].

59 E. Csatlós, *Remarks on the Reasoning: The Morals of a Hungarian Expulsion Decision in Times of Pandemic*, "Central European Public Administration Review" 2021, vol. 19, no. 1, pp. 185–186.

60 Metropolitan Court 15.K.701.176/2020/4. None of the Metropolitan Court judgments of the Iranian students are available in the database at the time of writing of this paper, the cited judgment was handled by the Hungarian Helsinki Committee.

61 It is monitored by the National Security Authority. Zs. Juhász, G. Virányi, T. Hegedűs, T. Visztra, *A Nemzetbiztonsági Szakszolgálat hatósági feladatai*, "Nemzetbiztonsági Szemle" 2020, vol. 8, no. 1, p. 145.

determining a foreigner's qualification generates data to be classified, it is imperative that the classification is based on legitimate grounds, and the document containing the classified information clearly indicates the classified status and level of classification.[62] No later than the commencement of the first procedural act affecting him/her, the person under criminal procedure shall be duly informed of his/her rights and shall be warned of his obligations including the data management rules of classified data.[63]

Conclusion

Soon after the state of emergency was announced in the spring of 2020, a case received huge press coverage: a group of Iranian university students were expelled from Hungary to Iran because of their alleged unlawful behaviour during their quarantine period with a ban on entry. All cases ended up in front of the Constitutional Court by constitutional complaints contesting, *inter alia*, the grounding of the administrative decisions and the effectivity of legal remedy. Later, the criminal investigations were closed and the ban on entry was annulled. Having a look at the case history and the legal arguments, further examinations of expulsion practice seemed to be worth examining, thus the scope of the study was expanded to related high court decisions.

In a strict sense, none of the publicly available expulsion cases of 2020 and the first half of 2021 was related to the pandemic or health issues, not even the cases of the Iranian students whose expulsion was ordered based on a criminal investigation of the breach of pandemic measures. However, the legal guarantees connecting to the factual and legal grounding of both administrative and judicial decisions as well as their relationship with the effective judicial review emerged in a surprisingly high number of the examined cases. The rule of law requirements and the relevant international and even Hungarian legal practice are on the same side of the argumentation that supports the unlawful nature of the practice seen in the Iranian Students' case: the immigration authority's decision should have incorporated the factual elements of the police initiation and ensure proper reasoning to the court that could have endured an effective review. If it is missing, according to the laws in force, the court should have declared the nullity of the authority resolution for serious procedural law violation (lack of proper factual grounding and legal reasoning).

62 Act CLV of 2009, Art. 6.

63 Gov. Decree 100/2018 (VI. 8.) on the detailed rules of investigation and preparatory procedure, Art. 42 (4) h.

In cases where the debate focused on the nature of classified information, the same problem arose: the (apparent) lack of reasoning. The legal norms ensure the necessary tool for having the possibility to gain access to classified documents. However, the experiences taken from the cases examined, and the information on its availability may be questioned. Unfortunately, the authority's decisions are not available to get further to the source of the problem. Nevertheless, as a general conclusion stemming from the studied cases, the reason for expulsion seems to be indisputable and gets dim under the cover of national security. In the view of the foreigner, such a situation is, however, confronting the right to 'effective' legal remedy and makes the whole procedure from the beginning until the end of the judicial phase a formal one. The authority's obligation to give information on procedural rights and obligations should be given a stronger role that may lead to a comprehensible and deeper understanding of the foreseeable reasons and the process of expulsion, irrespective of the global pandemic. However, a deeper analysis of the discretion of the State related to national security implications and the transparency of the procedure including the right to effective legal remedy is beyond the scope of the present paper.

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